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No. 79-1719

In The

Supreme Court of the United States

October Term, 1979

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Petitioner,

vs.

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian, CHARLOTTE SLOTKIN and CHARLOTTE SLOTKIN, as Executrix of the Estate of Bert Slotkin, deceased,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The petition filed by petitioner American Mutual Insurance Company of Boston (hereinafter referred to as "American Mutual") is one of three petitions evolving from the same action below. Respondents have already submitted opposition papers

to the petition of John McGrath (No. 79-1535) and are submitting opposition papers to the petition of Christopher McGrath (No. 79-1571) concurrently with the instant submission in opposition.

Unlike the petitions submitted by the McGraths, both of which constitute attempts to manufacture federal issues in an action decided under New York state law, counsel for petitioner American Mutual candidly admit that the decisions below rested on New York, not federal, law. Petitioner argues that the Court of Appeals for the Second Circuit wrongly decided the issue of agency under New York law and that the Court of Appeals held that the reinsurer could be found liable for the fraud of the primary carrier merely because the reinsurer retained the right of consent as to any settlement above the limits of the primary coverage. Petitioner further argues that the allegedly erroneous application of New York state law "will greatly increase the cost of doing business for reinsurers . . ." (Petition at p. 10). However, both of these arguments fail to reflect the actual, factual basis of the decision below. Quite simply, the Court of Appeals did *not* hold that the reinsurer was liable under New York law merely because it retained a right of consent as to any settlement above the primary coverage. Rather, the court found that there was ample evidence for a jury to conclude that the reinsurer was a knowing participant in a fraud on the infant respondent and his mother. Moreover, it is clear that such decision in no way increases the cost of business for reinsurers inasmuch as reinsurance liability for fraud is limited, by the opinion below, to those instances in which the reinsurer is itself a knowing participant in the fraud.[1] Accordingly, the decision

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1. Assuming *arguendo* that the decision below was not so limited and instead held that reinsurer liability for fraud could be premised merely on the reservation of a right to consent, petitioner's claim as to a nationwide increase in the cost of reinsurance resulting from the decision below would still be erroneous.

(Cont'd)

below, resting as it does upon the law of New York, and narrowly limited to those instances in which the reinsurer actually participates in defrauding the respondents, is an extremely poor candidate for a writ of certiorari.

STATEMENT OF FACTS

The instant action evolves from a state court malpractice case brought by the respondents herein, a brain-damaged child and his mother (18a-19a).[2] That action was settled for $185,000, just under the figure defendants' counsel therein represented to be the "policy limit", $200,000 (19a). In point of fact, there was an additional $1 million in excess coverage undisclosed by defendants' counsel therein (*id.*).

(Cont'd)

First, it is clear that the issue herein involves New York law and cannot possibly have any effect on cases not arising under the law of New York.

Secondly, because New York law is involved, any decision by the Court of Appeals for the Second Circuit as to the scope or content of New York law, or, for that matter, any opinion by this Court, could not constitute the "final word" on New York law. Obviously the "final word" as to New York law lies with New York's Court of Appeals and New York's Legislature. If the court below did err in its application of New York law, and this we steadfastly deny, such error could not bind the courts of New York. And if, as petitioner claims, the ramifications of the decision below are so far reaching, one would expect that we would not have to wait long for the New York courts to pass on the same issues. Of course, in reality, the chances of such resolution in the courts of New York are extremely slim for the simple reason that it is extremely unlikely that the bizarre factual pattern herein will re-occur.

All of this underscores respondents' basic point with respect to all three petitions for certiorari. A lower court decision resting solely on state law and decided in the context of a bizarre factual setting unlikely to re-occur is not the sort of decision which warrants a writ of certiorari.

2. All such references, unless otherwise indicated, refer to pages in the appendix to the petition for a writ of certiorari. Said appendix contains the decisions below.

Following the enforcement of the $185,000 settlement, respondents herein instituted an action against the present petitioner and others. In essence, respondents claimed that petitioner American Mutual and other named defendants fraudulently represented the insurance coverage to be only $200,000 and thereby induced respondents to settle the state court action for a fraction of the recoverable damages. These representations were by defendants Christopher McGrath and John McGrath (22a, 23a), the attorneys for Citizens, the primary carrier, by George Berkowitz, as trustee and counsel for the hospital, and by Paul Ratner (23a) assistant vice-president and claims manager of Citizens. Respondents claimed as damages the difference between the $185,000 settlement and the true worth of the medical malpractice claim, *i.e.,* the amount that would have been awarded absent the fraudulent inducement to settle.

A full jury trial of respondents' case was held in the District Court for the Southern District of New York before Judge Pollack. As might be expected, the trial was protracted, for respondents were, in effect, required to try two cases in one — the merits of the case sounding in fraud and the merits of the state court malpractice case (the case within the case).

The liability claim against petitioner American Mutual was premised on the reinsurer's *actual involvement* in the fraud on respondents. Specifically, the evidence indicated that Ratner was in frequent communication with the reinsurer throughout the settlement negotiations (48a). With each offer or proposal, Ratner indicated that he would have to secure approval. At these times, Ratner telephoned petitioner, informed petitioner of the current status of negotiations, and requested and received advice on how to proceed. Indeed, the reinsurer's consent to the settlement was required for any settlement above $50,000 (48a). These facts, established through Ratner's own testimony, were corroborated by the testimony of Toberoff and Christopher

McGrath (48a). Thus, the evidence indicated that petitioner, though not physically present at the malpractice trial, was as much a participant in the negotiations as any of the other defendants, the sole difference being that the reinsurer preferred to let Ratner handle the in-person negotiations.

Notwithstanding the proof that the reinsurer was aware of the fraud on respondents and, via the telephone and its agent Ratner, was a participant in the negotiations, the trial court dismissed the complaint against petitioner at the close of respondents' case (1a-3a).

At the conclusion of the trial, the jury returned a verdict in favor of respondents and against remaining defendants Citizens Casualty, Berkowitz, Ratner and the McGraths (33a). However, subsequent to the jury's verdict in favor of respondents, Judge Pollack granted defendants' motion for a directed verdict and dismissed respondents' complaint as to all named defendants. Judge Pollack's decision appears on pages 6a-15a of petitioner's appendix. A reading of that decision will clearly show that the dismissal of the complaint was based on one and only one basis — Judge Pollack's belief that, under the law of New York, a victim of misrepresentation waives the fraud if he proceeds to execute the agreement notwithstanding his awareness of the misrepresentation. In other words, Judge Pollack believed that, by enforcing the $185,000 settlement after they became aware of the excess coverage, respondents herein waived any claim for fraud which may have existed under New York state law.

In the appeal to the Court of Appeals for the Second Circuit, the Court of Appeals, for reasons more fully discussed in our opposition to the petitions of John and Christopher McGrath, held that the direction of judgment notwithstanding the verdict was error. In addition, the court held that there was a triable issue of fact as to the alleged agency of Ratner and, consequently, that the dismissal of the complaint as to the

reinsurers was error. Accordingly, the court ruled that respondents could either reinstate the verdict and judgment of $680,000 against defendants Citizens, Ratner and the McGraths or, alternatively, retry the case against those defendants and the reinsurers including American Mutual. Petitioner American Mutual now petitions for a writ of certiorari with respect to that ruling.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals merely held that a participant in fraud can be held liable for the damages resulting therefrom.

Petitioner attempts to portray the decision below as holding that a reinsurer can be held liable for the misrepresentations of the primary carrier merely by virtue of its retention of a right to consent to settlements. To be sure, the Court of Appeals did consider petitioner's right of consent as one factor to be considered. However, the court did *not* hold that such right, of itself, allowed the imposition of liability. Rather, the court held that petitioner's *actual* involvement in the negotiations, an involvement which consisted of frequent telephone communications and directions, created an issue of fact as to whether Ratner was utilized as an agent. In this regard, the Court of Appeals held that "[t]he reinsurers were closely involved in all the transactions leading up to the settlement" and "[t]here was abundant evidence, including Ratner's own testimony, that throughout the trial Ratner communicated with each of them directly or through his subordinate" (47a, 48a). Indeed, the court clearly noted that "[f]or the reinsurers to be liable for misrepresentation, plaintiffs needed to prove Ratner was acting as their agent or representative when he misrepresented the amount of coverage" (48a).

Thus, it is clear that the decision below does not increase the potential liability of reinsurers *qua* reinsurers one iota. Instead, the Court of Appeals merely held that there was ample evidence of petitioner's actual involvement in fraud to warrant submission of the issue to the jury. It is respectfully submitted that the narrow factual holding does not warrant a writ of certiorari.

II.

The testimony of Ratner, Toberoff, and Christopher McGrath was competent to establish Ratner's agency.

Petitioner makes two claims as to New York's law of agency which warrant comment. Petitioner claims that "under the law of the State of New York, the declarations of an alleged agent are not competent to prove the alleged agency" (Petition at p. 8). Petitioner further claims, "[u]nder New York Law, Mr. Ratner did not have apparent authority" (*id.*). The first statement is a hopeless confusion of the law. The second claim is simply irrelevant.

Under New York law, the alleged agent's own *extra-judicial* declarations are not, *of themselves,* sufficient to establish agency. *Kelly v. Diesel Const. Div. of Carl A. Morse,* 35 N.Y. 2d 1, 358 N.Y.S. 2d 685 (1974);*Moore v. Leaseway Transportation Corp.,* 65 A.D. 2d 647, 409 N.Y.S. 2d 746 (1st Dept. 1978), *aff'd,* 49 N.Y. 2d 720, 426 N.Y.S. 2d 259 (1980). This is not to say that, as here, the alleged agent's *in-court* testimony as to his communications with the alleged principal are incompetent or insufficient to establish agency.

"It is true, as contended, that agency as against the principal cannot be established by the declaration of the agent. But this rule often misleads to the contention that such agency cannot be proved by the testimony of the agent, *which is not the rule.*"

Steuerwald v. Jackson, 123 App. Div. 569, 108 N.Y.S. 41, 42 (2nd Dept. 1908). In this regard, "the agent is as competent a witness as any other person to testify under oath to facts within his knowledge touching the agency." *Brown v. Ingersoll,* 226 N.Y.S. 2d 479, 486 (n.o.r.) (Sup. Ct. Monroe Co. 1962). "Testimony of a principal or agent of relevant acts or conversations is proper to prove the fact of agency, and the extent of or limitation upon the agent's authority." *DelPiccolo v. Newburger,* 9 N.Y.S. 2d 512, 513 (n.o.r.) (App. Term, 1st Dept. 1939). Thus, in *Anthus v. Rail Joint Co.,* 193 App. Div. 571, 185 N.Y.S. 314 (3rd Dept. 1920), an employee's in-court testimony that she was in charge of reporting accidents sustained by employees of the company was deemed sufficient basis for the receipt of the employee's out-of-court report of an accident as an admission binding on the defendant-employer. *Also see, Cianci v. Board of Education of City Sch. Dist. of Rye,* 18 A.D. 2d 930, 238 N.Y.S. 2d 547, 550 (2nd Dept. 1963) (proof that employee was authorized to make incident report deemed sufficient to allow report into evidence as admission against employer).

The rationale was nicely explained by Professor Meacham:

> "It has just been stated that the agent cannot create authority by his own representations of authority . . . . Two somewhat different propositions must be distinguished. *In the first place testimony by the agent as to the nature and extent of his authority is obviously and necessarily admissible.* Along with the principal's own testimony it would ordinarily be the *best possible evidence.*" Meacham, *Law of Agency* (1952) at §95.

Given that their *in-court* testimony as to Ratner's communications with petitioner Ratner's out-of-court

declarations, as related by Toberoff, McGrath and Berkowitz, could then be properly considered in conjunction with Ratner's testimony. *Restatement (Second) of Agency,* §285 (1958). And to the extent proof of agency is dependent upon "contradictory evidence or evidence, though not contradicting or disputed, from which different inference may be drawn", a question of fact is made out for the jury. *Hedeman v. Fairbanks, Morse & Co.,* 286 N.Y. 240, 249 (1941); *Bertron Packing, Inc. v. Transworld Fabricators, Inc.,* 50 A.D. 2d 542, 375 N.Y.S. 2d 335, 337 (1st Dept. 1975); *Monroe v. Daimler-Benz of North America, Inc.,* 46 A.D. 2d 682, 360 N.Y.S. 2d 68 (2d Dept. 1974); *Theodore v. Hartford Accident & Indemnity Co.,* 60 Misc. 2d 991, 304 N.Y.S. 2d 688, 692 (Sup. Ct. Albany Co. 1969).

As for petitioner's claim that there was insufficient evidence to support a finding of apparent authority, it suffices to note, (1) respondents' claim was primarily focused on actual authority, and (2) what authority was or was not apparent is obviously an issue for the trier of facts.

CONCLUSION

For all of the above stated reasons, petitioner's application for a writ of certiorari should be denied in all respects.

Respectfully submitted,

s/ Theodore H. Friedman

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